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No. 90-5538

In The

Supreme Court of the United States

October Term, 1990

ZAKHAR MELKONYAN,

Petitioner,

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

(1) In a Social Security case that has been remanded to the agency by the district court, does the "final judgment in the action," from which the 30-day statute of limitations for the filing of an attorney's fee application under the Equal Access to Justice Act runs, commence with the district court judgment issued after all administrative proceedings have been completed, rather than with the administrative decision of the agency after remand?

(2) If not, should that ruling be given prospective effect only because the decision below was directly contrary to (a) all then-existing precedent, (b) all of the agency's pronouncements on the subject, and (c) the position taken in this litigation by respondent, who did not take the position he now asserts until the issue was raised *sua sponte* by the court of appeals?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

STATUTES, REGULATIONS, AND RULES

a. *Statutes*

TABLE OF AUTHORITIES – Continued

b. *Public Laws*

c. *Regulations*

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The opinion of the court of appeals (JA 27-36) is reported at 895 F.2d 556 (9th Cir. 1990). The judgment of the district court (JA 22) and the findings and recommendation of the magistrate (JA 19-21) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1990. The order denying rehearing and rehearing *en banc* was entered on May 29, 1990 (JA 37). The petition for a writ of certiorari was filed on August 23, 1990, and was granted on January 7, 1991. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following provisions of the Equal Access to Justice Act, 28 U.S.C. § 2412, are involved:

> **(d)(1)(A)** Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses are computed. The party shall also allege that the position of the United States was not substantially justified. * * *

(2) For the purposes of this subsection – * * * (G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement * * *

STATEMENT OF THE CASE

On May 28, 1982, petitioner Zakhar Melkonyan filed an application for Supplemental Security Income ("SSI") on the basis of disability under Title XVI of the Social Security Act, 42 U.S.C. § 1381 *et seq*. Petitioner alleged disability primarily on the basis of his chronic asthma and bronchitis, but he also presented evidence of hypertension, chest pain, attacks of dizziness, and mild obesity (Administrative Record ("R") 9, 92-102). His claim was further supported by his age (58), his lack of formal education (fourth grade), his inability to speak and understand the English language, his poor work history (R 56-64), and his personal physician's opinion that he could not work (R 103-04).

On October 11, 1983, a twenty-two minute hearing was held before an Administrative Law Judge ("ALJ"), at which petitioner proceeded *pro se*. Testifying through an interpreter, petitioner stated that, from 1949 through 1956, he had been a political prisoner in Siberia, and, from 1956 until his emigration to the United States in 1980, he had worked two hours per day putting bread into an oven for the Soviet Army (R 17-18). He testified that he had breathing problems and dizziness while working in the Soviet Union and that these problems persisted, exacerbated by three to four asthma attacks per day, with more frequent attacks at night, and an inability to walk more than a block without rest (R 18-20). Petitioner's wife, testifying in broken English, confirmed petitioner's testimony and explained that petitioner was unable to do household chores, that his dizziness and shortness of breath were chronic (R 22-23), and that he had worked for only two hours per day in the Soviet Union because "he could not stand on his feet and was dizziness [sic]" (R 22). Finally, in response to the ALJ's inquiry as to why petitioner was "spitting up" at the hearing, she explained that it was the result of a persistent "very nervous condition" (R 23).

Despite this evidence, the ALJ held that petitioner's conditions were not "severe" within the meaning of the regulations promulgated by respondent Secretary of Health and Human Services (the "Secretary") and, thus, denied petitioner's SSI application. The "severity regulation," to which the ALJ had referred, is a threshold determination in the Secretary's five-step sequential evaluation process (*see* 20 C.F.R. § 416.920), which allows

him to deny applications concerning solely those impairments that do not "significantly limit [the claimant's] physical or mental ability to do basic work activities . . . ." 20 C.F.R. § 416.920(c). Review before the Secretary's Appeals Council was denied on April 9, 1984 (JA 4). Thereafter, petitioner obtained counsel and filed a timely complaint in district court seeking review of the Secretary's decision.

On October 18, 1984, petitioner filed a motion for summary judgment. In his supporting brief, he argued that the evidence in the record supported a finding of disability and, in the alternative, that the ALJ had not met his legal obligation to fully and fairly develop the record, a requirement that is heightened when a claimant, such as petitioner, is proceeding *pro se*. The Secretary cross-moved for summary judgment, but shortly thereafter, on December 18, 1984, filed a "Supplemental Memorandum" requesting that the court remand the case to the Appeals Council for further proceedings to allow the Appeals Council to review new evidence not previously in the record (JA 6, 14-16).

Petitioner initially opposed a remand, believing that further proceedings would only engender delay and not result in a finding of disability (JA 7-8). On April 3, 1985, however, still without a decision from the district court, petitioner moved the court to either "issue [the decision], or remand the cause to the Secretary" (JA 9-10). In so moving, petitioner explained that his previous objection to a remand had been made on the assumption that the court would promptly make its decision, and that his new position was premised on the facts that his medical conditions had worsened and that he was facing increased

medical expenses. On April 5, 1985, the case was remanded to the Secretary for further administrative proceedings (JA 11).

On May 7, 1985, considering evidence that petitioner had submitted in conjunction with a second SSI application filed on May 30, 1984 (JA 14), the Appeals Council vacated the ALJ's prior decision and found petitioner disabled as of the date of his original SSI application (JA 14-16). The Appeals Council held that petitioner's age, lack of schooling, illiteracy, poor work history, and restriction to a "medium" level of exertion – all of which were supported by evidence in the original record – mandated a finding of disability.

On June 10, 1985, the Secretary's Office of General Counsel informed the U.S. Attorney handling the district court action "that the Appeals Council has issued a favorable decision" and that, therefore, "[i]f appropriate, [you should] have the action discontinued or dismissed" (JA 17). The U.S. Attorney, however, took no action. More than three months later, a check was issued to petitioner for $7910.39, representing retroactive benefits dating from his original SSI application (JA 24-26).

On May 18, 1986, although the U.S. Attorney still had not taken any action following the remand, or even informed the court of the Appeals Council's decision, petitioner moved in the district court for an award of attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d). On July 10, 1986, the Secretary opposed the motion on the ground that his position on the merits was substantially justified, but at no time did he argue that the fee application was untimely.

In a brief recommendation, the Magistrate found that fees should not be awarded because "it cannot be said from the evidence of record that the position of the government was not substantially justified" (JA 21). Shortly thereafter, the district court assumed jurisdiction over the application and, in a one-line judgment, denied petitioner's request (JA 22).

Petitioner appealed to the Ninth Circuit, and the parties fully briefed the substantial justification issue. On July 30, 1987, however, the Ninth Circuit clerk issued an order *sua sponte* stating that, because petitioner "filed an application for attorney fees over one year after judgment was rendered in the district court" (JA 23), he should either voluntarily dismiss his appeal or show cause why it should not be dismissed for lack of jurisdiction.

Thereafter, the parties briefed the timeliness issue, and the court of appeals, in an opinion entered on January 31, 1990, vacated and remanded the case to the district court with directions to dismiss the application as untimely. After reviewing the procedural history of the case, the court recited the statutory language that requires an EAJA applicant to file a fee petition "within thirty days of final judgment in the action," 28 U.S.C. § 2412(d)(1)(B), and noted that the EAJA's 1985 amendments define "final judgment" as "a judgment that is final and not appealable . . . ." *Id.* § 2412(d)(2)(G) (JA 32). The court of appeals acknowledged that it previously had held that the triggering event for the 30-day filing period was the district court judgment adopting a claimant-favorable Appeals Council decision, and not the district court's prior "order of settlement" remanding the case to the Appeals Council (JA 30-31). *See Papazian v. Bowen*, 856

F.2d 1455, 1455-56 (9th Cir. 1988). The court declined to follow that rule, however, because here the district court had never entered a judgment after remand (JA 31).

In contrast with its earlier order to show cause (JA 23), the court of appeals recognized that the district court's original remand order could not be a "final judgment" for EAJA purposes, since at that point the case lacked finality (JA 31). But it found against petitioner on the theory that a decision of the Appeals Council that is wholly favorable to a claimant is "the final judgment in the action" under 28 U.S.C. § 2412(d)(1)(B). Since petitioner's fee application was filed more than a year after this "final judgment," the court held that it was without "subject matter jurisdiction to entertain his application" (JA 33).

The court of appeals acknowledged that its holding was contrary to the leading precedent of a "sister circuit" and the EAJA's legislative history (JA 33, *citing Guthrie v. Schweiker*, 718 F.2d 104 (4th Cir. 1984)). Nevertheless, it rejected the Fourth Circuit's "assum[ption] that final judgment meant . . . a judgment only a court could enter," because the statute, *"aside from its use of the term 'judgment,'* gives us no reason to think that this is so" (JA 35) (emphasis added). Moreover, the court saw no "advantage to such an approach" because requiring mere "affirmations" of Appeals Council decisions would waste scarce judicial resources (JA 34).

SUMMARY OF ARGUMENT

The express language of the EAJA mandates that the 30-day period for the filing of an attorney's fee application does not begin to run until there is a final judgment of the court having jurisdiction over the application. 28 U.S.C. §§ 2412(d)(1)(B), (d)(2)(G). Congress' clear mandate is reaffirmed in the statute's legislative history and by the purposes of the EAJA. Indeed, the Secretary repeatedly had urged this interpretation of the statute prior to this case.

Now, the Secretary argues that certain fully favorable administrative decisions issued by the Social Security Administration, after remand from a district court, constitute "final judgments" triggering the 30-day filing period. That approach would engender unnecessary confusion over when, and what types of, post-remand decisions are "final" under the EAJA. This Court should thus reject the Secretary's position and hold, as the statute requires, that, in *all* cases, the 30-day clock does not begin to run until the district court has issued a post-remand judgment.

If, however, the Court upholds the ruling below, the decision should not be applied in this case. *See Chevron Oil v. Huson*, 404 U.S. 97 (1971). At the time that the Appeals Council decision was issued in petitioner's case, and indeed until the issuance of the decision below, all relevant precedent, as well as the Secretary's public pronouncements on the subject, supported petitioner's position that the EAJA's statute of limitations commences only after entry of a federal court judgment. Thus, retroactive application would be inequitable to petitioner and others similarly situated. *Chevron Oil*, 404 U.S. at 109; *American Trucking Ass'ns v. Smith*, 110 S.Ct. 2323, 2336 (1990) (plurality opinion).

ARGUMENT

I. THE LANGUAGE, HISTORY, AND PURPOSES OF THE EQUAL ACCESS TO JUSTICE ACT MANDATE THAT THE THIRTY-DAY PERIOD FOR FILING A FEE APPLICATION COMMENCES ONLY AFTER THE ENTRY OF A COURT JUDGMENT, NOT THE DECISION OF AN ADMINISTRATIVE AGENCY.

A. Overview of the EAJA.

The EAJA was first enacted in 1980 as a three-year experiment "to diminish the deterrent effect of seeking review of, or defending against, governmental action." Pub.L. No. 96-481, § 202(c)(1), 94 Stat. 2325 (1980). The law permits the court to assess fees against the federal government to the same extent that attorney's fees would be available against a private party under the common law or by statute. 94 Stat. 2328 (codified at 28 U.S.C. § 2412(b)). The heart of the EAJA, however, is 28 U.S.C. § 2412(d). That provision mandates an award of fees to eligible parties who have prevailed against the federal government, unless the government can show that its position is "substantially justified or that special circumstances make an award unjust." *Id.* § 2412(d)(1)(A). Congress' goals in enacting § 2412(d) were to "encourag[e] private parties to vindicate their rights and [to] 'curb[] excessive regulation and the unreasonable exercise of Government authority.' " *Commissioner v. Jean*, 110 S.Ct. 2316, 2322 (1990) (*quoting* H.R. Rep. No. 1418, 96th Cong.,

2d Sess. 12 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 4991).

In 1985, Congress reenacted the EAJA and made it permanent. In the process, Congress also fashioned amendments in order to restore its original purposes in certain areas. EAJA, Extension and Amendment, Pub.L. No. 99-80, 99 Stat. 183 (1985); H.R. Rep. No. 120, Pt. I, 99th Cong., 1st Sess. 1-11 (1985), *reprinted in* 1985 U.S. Code Cong. & Admin. News 132-39. Congress made clear, for instance, that fees were available in "any civil action," including "proceedings for judicial review of agency action . . . ." 28 U.S.C. § 2412(d)(1)(A). This represented an explicit rebuke of the Secretary's position that suits seeking review of Social Security disability determinations, such as petitioner's, did not come within the EAJA's purview. *See, e.g., Guthrie v. Schweiker*, 718 F.2d 104, 106-08 (4th Cir. 1983). Congress also provided that, in scrutinizing a substantial justification defense, the court must inquire into the reasonableness of the government's position both in the litigation and at the agency level. *Id.* § 2412(d)(2)(D); *see Jean*, 110 S.Ct. at 2319-20. The purpose here was to reject the government's view that it could escape liability by merely showing that its litigation position was reasonable, no matter how unreasonable the agency's underlying conduct. *See, e.g., Rawlings v. Heckler*, 725 F.2d 1192, 1195-96 (9th Cir. 1985).

This is the fourth EAJA case that this Court has reviewed in as many Terms. The first was *Pierce v. Underwood*, 487 U.S. 552 (1988), where the Court gave further definition to the substantial justification standard, held that district court rulings issued under that standard are subject to "abuse of discretion" review, and set the

parameters under which a court may enhance the $75 per hour statutory fee rate for "special factors" under 28 U.S.C. § 2412(d)(2)(A)(ii). The following Term, the Court held that work performed in conjunction with post-remand administrative proceedings in Social Security cases is compensable under the EAJA because such proceedings comprise part of the "civil action" for which fees are authorized under 28 U.S.C. § 2412(d)(1)(A). *Sullivan v. Hudson*, 109 S.Ct. 2248 (1989).

Just last Term, in *Jean*, 110 S.Ct. 2316, this Court held unanimously that once a court determines that the government's position on the merits is insubstantial, the government must pay the applicant's full fee on all of the fees issues on which the applicant prevails, without regard to whether the government's positions on those issues were "substantially justified." This decision was based not only on the statutory language, which indicates that only one "substantial justification" determination is required, but also on "the specific purpose of the EAJA . . . to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions." *Id.* at 2321 (citing *Hudson*, 109 S.Ct. at 2253). The Court clearly was concerned with government attempts to undermine the EAJA's purposes, especially in Social Security cases, where the cost of fee litigation itself could outstrip the cost of litigating the merits. *Id.* at 2322 & n.12.[1]

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[1] Although the Secretary was not a party in *Jean*, the Secretary regularly had taken the position rejected there. *See, e.g., Trichilo v. Sec'y of HHS*, 823 F.2d 702, 708 (2d Cir. 1987); *Cornella v. Schweiker*, 741 F.2d 170, 172 (8th Cir. 1984).

B. The Plain Language and Structure of the EAJA Require Reversal.

Since its original enactment in 1980, the EAJA has provided that a party seeking fees under 28 U.S.C. § 2412(d) "shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection . . . ." 28 U.S.C. § 2412(d)(1)(B). A plain reading of this provision, making reference to a final *judgment*, and a fee application submitted to the *court*, is that Congress intended the 30-day period to commence when a final judgment is issued by the court in which the action was pending.

According to the Secretary, however, the "judgment" referred to in § 2412(d)(1)(B) is not the judgment of a court, but the decision of the Appeals Council on remand from the court. That conclusion is not based on the language Congress has chosen, nor on any of the standard legal definitions of a "judgment," which is defined as

> The official and authentic decision of a *court of justice* upon the respective rights and claims of the parties to *an action or suit* therein litigated and submitted to its determination. . . . The law's last word in a *judicial controversy*, it being the final determination by a *court* of the rights of the parties upon matters submitted to it in an action or proceeding.

Black's Law Dictionary 841-42 (6th ed. 1990) (emphasis added). Nowhere in any of Black's subsidiary definitions of "judgment" or its annotations is it suggested that the term extends to decisions of administrative tribunals (*see*

id.), let alone one from which judicial review lies. *See* 42 U.S.C. § 405(g) (review of Secretary's final decisions); 28 U.S.C. § 2412(d)(1)(A) (EAJA fees available in judicial "proceedings for review of agency action").

To be sure, the Secretary has found a definition of the term that includes, secondarily, the rulings of "other tribunals" (Opp. at 8, *quoting Webster's Third New International Dictionary* 1223 (1986)), but that is a definition aimed at laypersons. The Secretary himself concedes that " 'judgment' is also used as a term of art having special application to judicial proceedings" (Opp. at 8), but then does not explain why he has referred only to the definition offered by a source intended for laypersons, rather than a legal dictionary, whose sole purpose is to explain such terms of art.[2]

Furthermore, the entire structure of the EAJA reinforces petitioner's position. The juxtaposition of the phrase "final judgment in the action," immediately before the clause that requires the applicant to "submit to the court an application for fees and other expenses," 28 U.S.C. § 2412(d)(1)(B), most reasonably is construed to mean that it is the *court* whose *judgment* triggers the 30-day filing period. Moreover, the EAJA uses the term "judgment" at several other points, and each time it is

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[2] Indeed, many lay dictionaries, other than the one cited by the Secretary, also define "judgment" solely in terms of a court order. *See The Oxford English Dictionary* 294 (2d ed. 1989); *The Random House Dictionary of the English Language* 1036 (2d ed. unabridged 1987); *The American Heritage Dictionary of the English Language* 709 (1981); *Webster's New Twentieth Century Dictionary* 990 (2d ed. 1979).

equally clear that the "judgment" referred to is one rendered by a court. Thus, the statute's general costs provision, 28 U.S.C. § 2412(a), provides that "a judgment for costs, as enumerated in section 1920 of this title," may be awarded to any party prevailing against the United States "in any civil action" by "any court having jurisdiction of such action." While subsection (a) does not define "judgment," its reference to 28 U.S.C. § 1920 requires that a bill of costs must be "filed in the case," taxed by "the judge or clerk of any court of the United States," and then "included in the judgment or decree." 28 U.S.C. § 1920. This further supports the reading that, when the EAJA speaks of a "judgment," it does so in its ordinary usage, *i.e.*, a decree rendered by a court in a judicial proceeding.

The EAJA further provides, in 28 U.S.C. § 2412(c)(1), that a "judgment" for costs against the United States or its officers shall be paid as set out in 28 U.S.C. §§ 2414 and 2517. Those sections, in turn, make quite clear that a "judgment" is rendered only by a court of the United States. *See id.* § 2414 ("payment of final judgments rendered by a district court"); § 2517 (payment of "final judgment rendered by the United States Claims Court"). Finally, a "judgment" under 28 U.S.C. § 2412(b) – the part of the EAJA permitting an award of fees under common law principles – "shall be paid as provided in sections 2414 and 2517 . . . ." 28 U.S.C. § 2412(c)(2). Of course, the "judgment" referred to in these sections is the one for costs itself, not the decree from which the costs are sought. But what is critical here is that Congress used the same word repeatedly throughout the EAJA, and there simply is no reason, either express or implicit in the

EAJA's design, to depart from the common sense principle of statutory construction that multiple uses of the same word ought to be accorded the same meaning. *See* 2A *Sutherland Statutory Construction* § 47.16, p. 161 (Sands 4th ed. 1984).

Further evidence that Congress intended the term "judgment" to carry its ordinary meaning is found in 5 U.S.C. § 504, a provision of the EAJA which is not before the Court, but which allows an award of fees in administrative proceedings where the government is represented "by counsel or otherwise." *See id.* §§ 504(a)(1),(b)(1)(C); *Sullivan v. Hudson*, 109 S.Ct. at 2257. Section 504, enacted at the same time as the provisions at issue here, is the only part of the EAJA that allows fees and expenses for administrative proceedings conducted prior to the filing of a civil action. In a provision which otherwise mirrors 28 U.S.C. § 2412(d)(1)(B), section 504 states that a "party seeking an award of fees and other expenses shall, within thirty days of a *final disposition in the adversary adjudication,*" file an application for fees. 5 U.S.C. § 504(a)(2) (emphasis added). Congress, therefore, knew of, and properly employed, the term "judgment" when referring to the action of a court, and the term "final disposition" when it wanted to refer to administrative action.

Because Congress' use of the term "judgment" is so clear that it lends itself to no reasonable interpretation other than that offered by petitioner, it is this Court's duty to give effect to that language and reverse the decision of the court of appeals. *See Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980).

C. The Legislative History and Judicial Interpretations of the Original EAJA Support Petitioner's Position.

Like the language of the 1980 statute, its legislative history offers no support whatsoever for the Secretary's position. *See* S. Rep. No. 253, 96th Cong., 1st Sess. (1979); H.R. Rep. No. 1418, 96th Cong., 2d Sess. (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 4984-5003. Indeed, in light of the statute's clarity, it is not surprising that the original enactment's legislative history on this issue is sparse. The little that there is, however, confirms petitioner's understanding that a court judgment is a necessary predicate to the commencement of the 30-day statute of limitations. S. Rep. No. 253, *supra*, at 7 (allowing fees after a voluntary dismissal and a settlement, as well as "a final judgment following a full trial on the merits"), 21 (same); H.R. Rep. No. 1418, *supra*, at 11, 18, *reprinted in* 1980 U.S. Code Cong. & Admin. News 4990, 4997 (same).

Moreover, the case law prior to the 1985 reenactment is fully supportive of our position. The leading case is *Guthrie v. Schweiker*, 718 F.2d 104 (4th Cir. 1983), where a Social Security claimant sought judicial review of the Secretary's decision denying benefits. The parties agreed to a remand for further administrative proceedings, which resulted in a decision partially favorable to the claimant. *Id.* at 105. Thereafter, the Secretary filed the new decision and the transcript of the administrative proceedings on remand with the district court. *Id.* After the claimant moved for summary judgment, the district court remanded once again for the taking of new evidence. *Id.* at 106. A third ALJ hearing was held, after which a

decision fully favorable to the claimant was issued and later affirmed by the Appeals Council.

When the Secretary failed to file the administrative record or even the outcome of those proceedings with the court, the claimant filed a copy of the last ALJ decision, asked the court to enter final judgment, and moved for fees under the EAJA. The district court, noting that the fee petition was filed more than 30 days after both the district court's second remand order and the Appeals Council's final administrative decision, dismissed the fee petition as untimely. *Id.*

The court of appeals reversed for three reasons, only one of which is directly relevant here. The court found the application timely because an administrative decision cannot be a "final *judgment*" under the language of the EAJA, a view confirmed by the EAJA's clear distinction between final court *judgments* and final administrative *decisions*. *Guthrie*, 718 F.2d at 106 (*comparing* 5 U.S.C. § 504(a)(2) *with* 28 U.S.C. § 2412(d)(1)(B)). Indeed, the court noted the Secretary's view that "an administrative decision cannot constitute a 'final judgment' for the purposes of EAJA." *Guthrie*, 718 F.2d at 106. The court concluded, therefore, that a district court order, entered after completion of the administrative proceedings on remand, is the event that triggers the 30-day statute of limitations.[3]

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[3] The court also held that the district court's original remand order could not be a "final judgment" because remand orders in Social Security cases are interlocutory in nature. *Id.* Although this proposition still holds for Social Security

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Other pre-1985 authority also is consistent with *Guthrie*. In *Brown v. Sec'y of HHS*, 747 F.2d 878, 883-84 (3d Cir. 1984), the claimant asked for EAJA fees within 30 days after the district court had remanded the case for further administrative proceedings, but before any determination that he was disabled. The Third Circuit held that "the successful party generally should not recover attorney's fees [immediately after remand] . . . since the claimant's rights and liabilities and those of the government have not yet been determined." 747 F.2d at 883; *accord Sullivan v. Hudson*, 109 S.Ct. at 2248. The court then endorsed the approach *suggested by the Secretary* that, if a claimant receives benefits after remand, the Secretary *must* "return to the court for a final judgment." *Id.* at 884. Responding to the claimant's concern that only certain remand orders under 42 U.S.C. § 405(g) require the Secretary to furnish the administrative record to the remanding court, the court deferred to the "Secretary's representation" that he will "file a copy of the government's decision upon conclusion of *any* remand decision in which a claimant receives benefits." *Id.* (emphasis in original). The Third Circuit reasoned that the court would then be able "to enter[] the final judgment contemplated by the EAJA," *id.*

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remands for the taking of new or additional evidence Social Security remand orders that modify or reverse the decision of the Secretary on legal grounds are immediately appealable. *See Sullivan v. Finkelstein*, 110 S.Ct. 2658 (1990) (discussed in more detail at pp. 26-33 *infra*). The court also found support in 42 U.S.C. § 405(g), the jurisdictional provision governing Social Security actions, that requires the Secretary to file the administrative record with the district court to allow the court to enter a judgment with respect to certain administrative decisions.

at 884-85, and noted that, if the Secretary failed to ask for a final judgment, the court could require the Secretary to do so under its general equity powers. *Id.* at 885 (*citing Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939)).

Finally, in *Taylor v. Heckler*, 778 F.2d 674 (11th Cir. 1985), the claimant won a remand from the district court, and filed his first EAJA petition within 30 days of that order. That petition was rejected as premature, *id.* at 675, presumably because the claimant had not yet proved his disability. After prevailing on remand, the claimant obtained a dismissal order from the district court and moved for EAJA fees within 30 days thereafter. *Id.* The district court denied this second application on the ground that such a dismissal order was not "a final judgment within the meaning of the EAJA." *Id.* The court of appeals reversed, concluding that the order of dismissal, rather than the initial remand order, was the final judgment that commenced the EAJA's 30-day filing period. *Id.* at 677-78. *Taylor* also stated that "a final judgment must have been entered *in the district court* before a litigant can apply for an attorney's fee under the EAJA." *Id.* at 677 (emphasis added).[4]

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[4] The *Taylor* court questioned whether all remand orders should be considered interlocutory, rather than final orders, but felt bound by circuit precedent that all such orders were interlocutory in nature for purposes of appeal under 28 U.S.C. § 1291. 778 F.2d at 677 & n.2. It appears to have been the Secretary's position in *Taylor*, *Brown*, and *Guthrie* that the remand decision, issued prior to any entitlement to benefits, was the "final judgment" for purposes of triggering the 30-day filing period. However, during the same general time period,

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Thus, prior to the 1985 amendments, the case law confirmed the clear meaning of the statutory language – that a "final *judgment*" under the EAJA can only be rendered by a court.

D. The 1985 Amendments, Their History, and Purpose Strongly Support Petitioner's Position.

As indicated above, the 1985 law made the EAJA permanent and enacted certain amendments, one of which is directly relevant here. Primarily because of judicial confusion over the word "final," Congress enacted a definition for the term "final judgment:"

> "final judgment" means a judgment that is final and not appealable, and includes an order of settlement;

28 U.S.C. § 2412(d)(2)(G). By its terms, there is nothing in this definition that alters the common understanding of the term "judgment" as it is used in 28 U.S.C. § 2412(d)(1)(B) and elsewhere in the EAJA, and as confirmed by all then-existing circuit precedent, to mean a court judgment and not an agency decision.

Moreover, Congress' inclusion of "an order of settlement" as a type of "final judgment" simply reinforces the

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the Secretary also argued that such remand orders cannot support an award of fees because the claimant had not yet prevailed in the litigation. *See, e.g., McGill v. Heckler*, 712 F.2d 28, 30 (2d Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984); *see also Sullivan v. Hudson*, 109 S.Ct. at 2248 (established rule is that claimant is not prevailing party until he or she is found disabled).

previously unchallenged understanding that a "judgment" is an order rendered by a court. Orders of settlement are issued in the judicial context; clearly, they are not references to administrative determinations before the Social Security Administration. Under the doctrine of *ejusdem generis*, therefore, the Court should "restrict[] application of the general term ["judgment"] to things that are similar to those enumerated ["order of settlement"]," 2A *Sutherland Statutory Construction* § 47.17, p. 166 (Sands 4th ed. 1984), and conclude that all "judgments" under the EAJA, like settlement orders, must emanate from a federal court.

The Secretary, nevertheless, posits that the 1985 amendment wholly, but silently, changed the definition, and transformed some, but not all, Appeals Council decisions into "judgments" (Opp. at 8-9). The legislative purpose behind the 1985 amendment, however, had nothing to do with overturning the accepted definition of "judgment." At legislative hearings, numerous witnesses expressed concern that the judiciary was confused over whether a judgment was "final" after the period for appeal had ended (normally 60 days under Fed. R. App. P. 4), or when it was rendered, thus starting the 30-day clock immediately upon entry of the judgment. *See, e.g. Equal Access to Justice Act Amendments: Hearing on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 33-34 (1985) ("courts have been split . . . . Some have held that the fee application has to be filed within thirty days of the *District Court judgment*. . . . Clarifying the definition of 'final judgment' to mean when the government's right to appeal has lapsed,

will end the confusion . . . ") (emphasis added); *Equal Access to Justice Act Amendments: Hearing on H.R. 5059 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. 24 (1984) (testimony of Carolyn Kuhl, Deputy Assistant Attorney General) ("It is unclear under the act, whether a final judgment occurs when the *court* enters an appealable order or when a party's right to appeal that order lapses") (emphasis added); *Reauthorization of Equal Access to Justice Act: Hearing on S. 919 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 75-76 (1984) (same).

Congress took this testimony to heart and enacted the position preferred by a majority of those testifying: that the court's judgment would not be final until the time for appeal had lapsed. The legislative history makes abundantly clear that (1) this amendment would not change the recognized definition of "judgment" and (2) "judgment" as used in subsection (d) means a court order:

> H.R. 2378 defines "final judgment" to mean a judgment which is not [appealable], including an order of settlement. The meaning of final judgment is important because fee petitions must be filed within thirty days of such judgment. [C]ourts had taken a variety of approaches to the question. Some rule[d] that a judgment was final *when the decision was docketed* and still others when the time to appeal had run. By adopting this last interpretation, this bill will give both courts and litigants clear guidance . . . .

H.R. Rep. No. 120, Pt. I, 99th Cong., 1st Sess. 7 (1985), *reprinted in* 1985 U.S. Code Cong. & Admin. News 135 (emphasis added) (hereafter "House Report I"); *see also* H.R. Rep. No. 120, Pt. II, 99th Cong., 1st Sess. 6 n.26 (1985), *reprinted in* 1985 U.S. Code Cong. & Admin. News 156 n.26 (hereafter "House Report II") (making numerous additional references to district court and appellate court orders as "final judgments" for EAJA purposes).

Since Congress knew that Social Security matters comprised the bulk of the EAJA caseload, the Committee's continued references to judicial orders severely undercuts any interpretation that construes the Secretary's administrative decisions to be "final judgments" under 28 U.S.C. § 2412(d)(1)(B). *See* Administrative Office of the U.S. Courts, *Annual Report of the Director for the Twelve Month Period Ending June 30, 1984 – Report of Fees and Expenses Under The Equal Access to Justice Act of 1980* 92 (63% of all EAJA filings were in Social Security cases). Finally, as if to foreclose the decision ultimately reached below, the Committee expressly rejected it:

> the [court's] remand decision is not a "final judgment," nor is the agency decision after remand. Instead, the District Court should enter an order affirming, modifying, or reversing the final HHS decision, and this will usually be the final judgment that starts the 30 days running.

House Report I at 19 (*citing Guthrie*, 718 F.2d 104; *Brown*, 747 F.2d 878); *see also Bradley v. Sec'y of HHS*, 741 F.Supp. 1461, 1464 (D. Idaho 1990) ("Given the legislative history behind the 1985 EAJA amendments, it is difficult, if not impossible, for this Court to understand the position of the Ninth Circuit concerning the 1985 amendments").

Thus, there can be no doubt that the "clear meaning of the statute as revealed by its language, purpose, and history" requires reversal of the decision below. *Southeastern College v. Davis*, 442 U.S. 397, 411 (1979).

E. This Court's Decision in *Sullivan v. Hudson* Further Undermines the Secretary's Position Here.

Further support for petitioner's position is found in *Sullivan v. Hudson*, 109 S.Ct. 2248, where the Court held that, because proceedings on remand from the district court in Social Security actions are part of the EAJA's "civil action," the work performed by the claimant's representative on remand is compensable. *Id.* at 2253-57. In doing so, the Court expressly adopted the view that it is the district court judgment issued after the remand proceedings are complete, and *only* such a judgment, that constitutes the "final judgment" under 28 U.S.C. § 2412(d)(1)(B). 109 S.Ct. at 2255.

The Court first reviewed the highly integrated Social Security claims process, involving administrative and judicial review, remand, and, often, further judicial review. *Id.* at 2254. The Court noted its "past decisions interpreting other fee-shifting provisions [that] make clear that where administrative proceedings are intimately tied to the resolution of the judicial action and necessary to the attainment of the results Congress sought to promote by providing for fees," *id.* at 2255, fees for administrative work should be allowed. *See, e.g., Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). Following those cases, the Court

had little problem holding that, given the "close relation in law and fact" between the administrative and judicial proceedings, *Hudson*, 109 S.Ct. at 2256, fees are available under the EAJA for time spent on remand. To hold otherwise, would "ascribe to Congress an intent to throw the Social Security claimant a lifeline that it knew was a foot short." *Id.*

As a necessary predicate to its decision, the *Hudson* Court repudiated the Secretary's contention here. The Court noted that a remand, prior to the issuance of a decision actually making a finding of disability, does not ordinarily make the claimant a "prevailing party" for EAJA purposes. *Id.* at 2255. Thus, the Court stated:

> the EAJA provides that an application for fees must be filed with the court "within thirty days of final judgment in the action." 28 U.S.C. § 2412(d)(1)(B) (1982 ed., Supp. V). As in this case, there will often be no judgment in a claimant's action for judicial review until the administrative proceedings on remand are complete. See *Guthrie v. Schweiker*, 718 F.2d 104, 106 (C.A.4, 1983) ("[T]he procedure set forth in 42 U.S.C. § 405(g) contemplates additional action both by the Secretary and a district court before a civil action is concluded following a remand"). The Secretary concedes that a remand order from a district court to the agency is not a final determination of the civil action and that the district court "retains jurisdiction to review any determination rendered on remand." Brief for Petitioner 16, 16-17.

Id.; *accord Myers v. Sullivan*, 916 F.2d 659, 679 n.20 (11th Cir. 1990) (decision below "would seem to be contrary to *Sullivan v. Hudson*"); *Gutierrez v. Sullivan*, 734 F.Supp. 969, 970-71 (D. Utah 1990) (expressly rejecting result below as

contrary to *Hudson*); *Lyden v. Howerton*, 731 F.2d 1545, 1551-53 (S.D. Fla. 1990) (relying on *Hudson* and Ninth Circuit's decision in *Papazian v. Bowen*, 856 F.2d at 1456); *see also Sullivan v. Finkelstein*, 110 S.Ct. at 2665 n.8.

It is thus clear that the concept of a "civil action" under the EAJA – from which the Court's holding in *Hudson* flows – begins with a complaint *and ends* with a court judgment. The decision below runs counter to the essential *ratio decidendi* of *Hudson* and must, therefore, be rejected.

F. The Court's Decision in *Sullivan v. Finkelstein*, Involving the Issue of Appealability Under 28 U.S.C. § 1291, Does Not Help Respondent.

The Secretary is also in error in attempting to engraft the principle announced last Term in *Sullivan v. Finkelstein*, 110 S.Ct. 2658, on the EAJA's definition of "final judgment." The narrow ruling in *Finkelstein* – that a district court order remanding a case under the fourth sentence of the Social Security Act's jurisdictional provision, 42 U.S.C. § 405(g), is a "final decision" for purposes of appeal under 28 U.S.C. § 1291 – does not speak to, let alone up-end, the deeply embedded understanding, repeatedly endorsed by the Secretary himself, that a "final judgment" under the EAJA must be issued by a court. To the contrary, the actual ruling in *Finkelstein* is fully consistent with petitioner's position because the "judgment" held appealable there was one issued by the district court, not the agency. 110 S.Ct. at 2263-64.

In *Finkelstein*, the claimant was a widow whom the Secretary had found not disabled under a regulation that

requires individuals seeking survivors' benefits to have a so-called "listed impairment" as defined by the Secretary. *See* 20 C.F.R. Part 404, Subpart P, Appendix I (listing of specific medical conditions entitling an applicant to a finding of disability without further inquiry). The enabling legislation, however, requires a finding of disability if the claimant is precluded "from engaging in any gainful activity." 42 U.S.C. § 423(d)(2)(B). The district court agreed with the Secretary that the claimant did not have a listed impairment, but nevertheless remanded the case for further findings as to her ability to engage in gainful activity, thus "essentially invalidat[ing], as inconsistent with the Social Security Act, the Secretary's regulation restricting" survivors' benefits to those with a listed impairment. *Finkelstein*, 110 S.Ct. at 2663. Rather than accepting the remand, the Secretary sought an immediate appeal of this important issue of law, but the Third Circuit dismissed the appeal on the ground that the remand order was an interlocutory, non-appealable order under 28 U.S.C. § 1291.

The two most prominent features of the *Finkelstein* decision are its confined scope and its practical approach to the problem of obtaining appellate review of the particular type of district court order at issue there. Thus, the opinion begins by cautioning that it only addresses whether certain § 405(g) remand orders, not all remand orders, or even other orders under § 405(g), are appealable. *Finkelstein*, 110 S.Ct. 2662-63 & n.3 Moreover, the Court recognized that, if the Secretary issued a decision favorable to the claimant on remand, there would be no way for the Secretary to appeal the important adverse ruling of law included in the district court's decision. *Id.*

at 2664 ("there would be grave doubt . . . whether he could appeal his own order").

Textual support for the decision in *Finkelstein* came from the fourth sentence of § 405(g), which provides that the district court, in reviewing final administrative decisions of the Secretary, may enter a "judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing." 42 U.S.C. § 405(g). The use of the term "judgment," when coupled with the eighth sentence's declaration that such judgments "of the court shall be final," convinced the Court that all "sentence-four" judgments, including those ordering a remand, are appealable under § 1291. *Finkelstein*, 110 S.Ct. at 2663-64.

The Court contrasted this scenario with the one envisioned by Congress in sentences six and seven of § 405(g). Sentence six allows the court to remand the case in two instances: (1) when the Secretary moves the court for remand prior to filing his answer to the claimant's complaint; and (2) when, at any time, the court finds that there is new evidence that is material and there exists good cause for not having considered that evidence previously. The second clause of sentence six further provides that, after the case is remanded, the Secretary shall take additional evidence, affirm or modify his previous findings of fact and decision, and file with the court all additional findings, his new decision, "and a transcript of the additional record and testimony upon which his action in modifying or affirming was based." 42 U.S.C. § 405(g). The seventh sentence provides for post-remand district court review of cases remanded under sentence six. *Finkelstein*, 110 S.Ct. at 2664. Thus, the "sixth sentence

of § 405(g) plainly describes an entirely different type of remand" from that allowed by sentence four, *id.*, which is appealable, by *either* party, at the earliest, after the Secretary has complied with his responsibilities under the second clause of sentence six and the district court engages in the review contemplated by sentence seven. *Id.* at 2664-65.

The Secretary attempts to bootstrap *Finkelstein*'s holding concerning sentence four of § 405(g) into a wholesale attack on EAJA jurisdiction (Opp. 12). Because there is nothing in sentence four "that requires the district court to do anything further after the remand to the Secretary" (*id.*), the argument goes, the Appeals Council's decision must, by default, be the final "judgment" under the EAJA. As we have explained, this reading of the term "judgment" flies in the face of the plain meaning of the EAJA, its legislative history and purposes, and this Court's recent pronouncement in *Sullivan v. Hudson*. Indeed, in *Finkelstein*, where the Secretary argued, and proved victorious on his claim that sentence-four remand orders are appealable, he also conceded that petitioner's reading of the EAJA's "final judgment" provision was correct, and, in fact, required by *Hudson*:

> we agree that it is appropriate for the Secretary to notify the district court of a decision in the claimant's favor on remand so that EAJA fees may be awarded . . . . All but one of the cases cited by respondent [*e.g.*, *Brown*, *supra*, 747 F.2d at 884] . . . refer to the Secretary's filing with the court any decision on remand that is favorable to the claimant . . . [to] *provide[] a realistic mechanism for the award of attorney's fees at that point.*

* * *

> [The Secretary only has to file his amended findings and record after sentence six remands]. Of course, where the court has remanded the cause to the Secretary for a rehearing because it has found the Secretary's first decision denying benefits to have been unlawful, it is appropriate for the Secretary to file *any* new decision awarding benefits with the court so that the court can consider whether attorney's fees should be awarded under the EAJA. See *Sullivan v. Hudson*, 109 S.Ct. at 2255.

Reply Brief for Secretary at 11 & n.8, 44 & n.35, *Sullivan v. Finkelstein*, 110 S.Ct. 2658 (No. 89-504) (emphasis added); *accord id.* at 25-26 & n.19; Secretary's Petition for Writ of Certiorari at 16 n.9, *Sullivan v. Finkelstein*, 110 S.Ct. 2658 (No. 89-504); Reply Brief for the Secretary at 17, *Sullivan v. Hudson*, 109 S.Ct. 2248 (No. 88-616) ("it of course is appropriate for the Secretary to file that decision [after remand] with the district court" so that EAJA fees can be awarded). Thus, as the Secretary recognized, there simply is no reason, nor a basis in the language chosen by Congress when it drafted the EAJA, to apply appealability principles to this case.

The *Finkelstein* opinion took great pains to emphasize both that it did not involve the EAJA and that the district court's retention of jurisdiction to enter a "final judgment" *for EAJA purposes*, as described in *Hudson*, had not been altered. *Finkelstein*, 110 S.Ct. at 2666. Thus, the Secretary is plainly wrong in contending that an Appeals Council decision constitutes a "final judgment" after a sentence-four remand because there is nothing further required of the district court. While that is arguably true on the merits of a Social Security claim under § 405(g), it

is obvious that the district court has jurisdiction *under the EAJA* to entertain the attorney's fees motion itself, which is exactly what the district court did, and was required by the EAJA to do, in this case (JA 22). *See Hudson*, 109 S.Ct. at 2255 ("the remanding court continues to retain jurisdiction over the action within the meaning of the EAJA"); *see also* Reply Brief for the Secretary at 26 n.19, *Finkelstein v. Sullivan*, 110 S.Ct. 2658 (No. 89-504) (referring to district court's "inherent" retention of jurisdiction to award attorney's fees, after a sentence-four remand, *citing Hudson*, 109 S.Ct. at 2254-55).

The impossibility of rationally applying *Finkelstein* to the EAJA is made clear by the facts of this case. After petitioner filed his complaint (JA 3-5), he moved for summary judgment. While that motion was pending, the Secretary moved for "a voluntary remand for further administrative proceedings in this case" (JA 6). The purpose of this request was, in the Secretary's words, to bring "new evidence and information to the attention of the Appeals Council." *See* Defendant's Opposition to Plaintiff's Motion for Attorney Fees at 2 (C.D. Cal. filed July 10, 1986). In particular, the Secretary wanted to review new medical evidence that had come to light in conjunction with petitioner's second application for SSI benefits, some of which petitioner had attached to his motion for summary judgment. *Id.* The Secretary did not concede legal error of any kind. After petitioner consented (JA 9-10), the district court remanded the case (JA 11), and the Appeals Council made a finding of disability based on the new evidence (JA 14-16).

It is clear that this was a sentence-six remand. The district court, in effect, "order[ed] additional evidence to

be taken before the Secretary." 42 U.S.C. § 405(g) (sentence six). By contrast, the remand order did not "enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary . . . ." *Id.* (sentence four). Indeed, nothing was affirmed, modified, or reversed; rather, the parties agreed, with the court's approval, to have the Secretary look at new evidence bearing on the application.

The lesson here is that petitioner's EAJA application was timely regardless of what type of remand order was issued by the district court. Given the 1985 legislative history, it is inconceivable that Congress wanted the courts to engage in hair-splitting over whether a case was remanded under sentence four or sentence six, a fact which has no relevance whatsoever to a claimant's entitlement to fees under the EAJA. House Report II at 6 n.26 (warning twice against "overly technical" interpretation of 30-day period, because "[t]his section should not be a trap for the unwary resulting in the unwarranted denial of fees"). Such hair-splitting, however, would be the order of the day under the regime advocated by the Secretary. In some instances, it will be unclear, especially on the face of the remand order, whether a case has been remanded under sentence four or sentence six. *See Hudson*, 109 S.Ct. at 2252; *Myers*, 916 F.2d at 677 n.18 (illustrating difficulty of distinguishing between fourth-sentence and sixth-sentence orders); *cf. Finkelstein*, 110 S.Ct. at 2665 n.8 ("it is far from clear that *Guthrie* did not involve a sixth-sentence remand"). Courts will also be faced with the question whether the administrative decision, or the judgment of the court, supplies the relevant trigger date

in cases involving both a fourth-sentence and sixth-sentence remand, as would be the situation where the court remanded because there was good cause for the taking of new evidence and the ALJ had erred as a matter of law in failing to take testimony from a vocational expert. *Myers*, 916 F.2d at 677 n.18, 678 n.19 (noting that three of four cases before court involved hybrid fourth-sentence/sixth-sentence remand orders); *compare Hudson*, 109 S.Ct. at 2252.[5]

For all these reasons, *Finkelstein* does not speak to the EAJA, as the Court itself noted. 110 S.Ct. at 2665 n.8, 2666.

G. Adoption of the Decision Below Will Render Administration of the EAJA Unworkable, Especially in Social Security Cases.

As we have shown, Congress intended that the time in which EAJA applications must be filed runs from the issuance of a "final judgment" by a federal court. The following additional reasons demonstrate why Congress could not have countenanced the Ninth Circuit's ruling,

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[5] We acknowledge that the Sixth Circuit has very recently held an Appeals Council decision after remand to be a "final judgment" for EAJA purposes because the case had been remanded under sentence four, indicating that a different result would obtain in a sixth-sentence case. *Buck v. Sec'y of HHS*, No. 89-4130, slip. op. at 13 (6th Cir. January 18, 1991), 1991 U.S.App. LEXIS 787; *see also Jabaay v. Sullivan*, 920 F.2d 472, 474-75 (7th Cir. 1990) (recognizing Secretary's duty to file with court administrative record after remand, and court's duty to review that record, but nevertheless holding that agency decision is "final judgment" for EAJA purposes).

and why adherence to the decision below would render administration of the EAJA utterly unworkable, especially in Social Security matters, which comprise the vast majority of EAJA cases.[6]

First, the Ninth Circuit's ruling will create havoc in the filing of dual applications for attorney's fees under the EAJA and under § 206(b) of the Social Security Act, 42 U.S.C. § 406(b). Social Security benefits fall into two broad classifications. The first, issued under Title II of the Social Security Act, 42 U.S.C. § 401 *et seq.* ("Title II benefits"), includes payments to retired and disabled workers, and certain of their relatives and survivors, based on the earnings and contributions of a retired, disabled, or deceased worker. The second, SSI, is a public welfare program, paid from general government revenues, to disabled or retirement-age individuals living in poverty. *See* Title XVI of the Social Security Act, 42 U.S.C. § 1381 *et seq.*[7]

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[6] In fiscal year 1990, 93% of all EAJA applications filed were against the Secretary, nearly all of which were in Social Security disability cases. Administrative Office of the U.S. Courts, *1990 Annual Report of the Director – Report of Fees and Expenses Awarded Under the Equal Access to Justice Act* I-24 & Table 20. In fiscal year 1989, 1,858 claimants won their Social Security cases by outright district court reversal, while 5,117 prevailed after remand, indicating that the typical EAJA application arises in a court-remanded case such as this one. Social Security Administration, *Annual Report to the Congress* 29 (April 1990).

[7] Many SSI recipients have some work history and, therefore, also receive some Title II benefits, thus the term "*supplemental* security income," or SSI. As of December 1988, 47.8% of

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Under 42 U.S.C. § 406(b), "*[w]henever a court renders a judgment*" favorable to a Title II claimant, "the court may determine and allow *as part of its judgment*" an attorney's fee in an amount not exceeding 25% of the claimant's past-due benefits, to be paid out of the "past-due benefits to which the claimant is entitled by reason of such judgment." *Id.* § 406(b)(1) (emphasis added). In practice, after it is clear that the claimant has prevailed, the claimant's attorney will generally apply for a fee under both the EAJA and § 406(b), but only after, or in conjunction with, a request for the entry of final judgment. Congress recognized that joint EAJA/§ 406(b) applications were the norm, and so in the 1985 amendments it required an offset of § 406(b) fees against the fees awarded under EAJA, to allow claimants to keep as much of their past-due benefits as possible. Pub.L. No. 99-80, § 3, 99 Stat. 186 (28 U.S.C. § 2412 note); House Report I at 20 (purpose is to preclude "double dipping" by attorneys and to make sure claimant is not deprived of needed benefits). Thus, if the claimant has a colorable EAJA claim, the attorney is ethically obligated to seek such a fee, so as to maximize the claimant's economic well-being.

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all SSI beneficiaries received at least some Title II benefits. Social Security Administration, *Social Security Bulletin, Annual Statistical Supplement* 333, Table 9.D2 (1989). Of the over 7700 disability cases filed in district court during fiscal year 1989, about half were pure Title II claims, 1300 were pure SSI claims, and the remaining 2,600 were concurrent claims. Social Security Administration, *Annual Report to the Congress* 29 (April 1990).

Adoption of the decision below will throw this system into chaos. Within 30 days of the issuance of a "favorable" administrative decision on remand, the claimant's attorney will have to seek a fee under EAJA. Yet he or she will be unable to be awarded a fee under § 406(b) because there does not exist a judgment upon which to do so, the very judgment that the Secretary now claims may not even be issued at all, at least in "sentence-four" cases, under *Finkelstein*. Of course, the court *should* issue such a judgment for § 406(b) purposes, which would be precisely the same judgment that petitioner urges commences the 30-day statute of limitations for the filing of an EAJA petition. Thus, there is absolutely no reason to insist that the EAJA applicant file a fee petition immediately after the administrative decision, when the district court, in most cases, will also be considering a § 406(b) application, at which time the court can enter a judgment and, if necessary, perform the EAJA/§ 406(b) offset that the law requires.[8]

The practical impact on the claimant of the decision below is vividly demonstrated by *Watson v. Sullivan*, 735 F.Supp. 971 (D. Ore. 1990), in which the court followed the ruling below, and held untimely an EAJA application

[8] Moreover, it takes about 60 days for the Secretary to calculate the claimant's past-due benefits after a favorable decision (*see* App. 1a), which, therefore, is the first point that the district court can calculate the amount of fees allowable under § 406(b); if the claimant is required to file for EAJA fees within 30 days of the administrative decision on remand it will be impossible for the claimant to request, or for the court to award, a specific amount under § 406(b). *See generally Smith v. Bowen*, 815 F.2d 1152 (7th Cir. 1987).

filed 60 days after the claimant's attorney had received the ALJ's decision on remand. *Id.* at 972-73. The court declined to enter a final judgment for EAJA purposes, holding that the administrative decision already amounted to one, but nevertheless awarded in excess of $7000 under § 406(b), all of which was deducted from the claimant's past-due benefits. Thus, the court was willing to enter judgment for § 406(b) purposes, as the law requires, but was unable to do so for EAJA purposes. The real loser, of course, was the claimant, who may well have avoided a $7000 loss if the court had entertained the EAJA application.[9]

A much more sensible result was reached in *Bradley v. Sec'y of HHS*, 741 F.Supp. 1461 (D. Idaho 1990), where the Secretary argued that the decision below was controlling and that the court should deny EAJA fees because the application had not been filed within 30 days of the administrative decision on remand. *Id.* at 1463. At the same time, however, the Secretary also asserted that a fee under the Social Security Act could not be awarded because "there must first be final judgment ordered by the court in order to properly file for attorneys fee approval under § 406(b)." *Id.* at 1465. After expressing grave doubt about the Ninth Circuit's interpretation of the EAJA and the 1985 legislative history, *id.* at 1464, the

[9] In fiscal year 1990, just over 90% of all EAJA applications were granted. Administrative Office of the U.S. Courts, *1990 Annual Report of the Director – Report of Fees and Expenses Awarded Under the Equal Access to Justice Act* I-24, Table 20. Thus, it is very likely that the claimant in *Watson* would have been made whole, if not for the constraints imposed by the decision below.

court distinguished the decision below on the ground that the Appeals Council decision there was fully claimant-favorable, a reason given by the Ninth Circuit for not requiring the Secretary to file his new decision with the district court under § 405(g) (JA 32); in *Bradley*, however, the decision was not fully claimant-favorable because the Appeals Council finding of disability did not reach back as far as the claimant had urged. 741 F.Supp. at 463. The court, therefore, entered a final judgment and awarded fees under both statutes.

Second, the Ninth Circuit's decision assures that most EAJA petitions will have to be filed before all of the work on the case is completed. In almost every court-remanded case, work will be performed to insure that the past-due benefits are properly calculated and that the continuing monthly payment is for the correct amount. Especially in the needs-based SSI program, this process is extraordinarily complex. *See* 20 C.F.R. §§ 416.1100-1266; *see also* 20 C.F.R. §§ 404.401-468, 404.1360-1414 (set-offs and deductions under Title II). Since this work is "necessary . . . to the ultimate vindication of the claimant's rights," it is compensable under the EAJA. *Hudson*, 109 S.Ct. at 2257. If the ruling below is affirmed, however, the EAJA applicant either will generally have to forego fees for work properly compensable under *Hudson* or proceed in a piecemeal fashion by amending the original fee application, assuming that such an amendment would be timely.

Third, the Ninth Circuit failed to recognize that the Secretary's administrative review process is a highly informal one, in which it is often difficult, if not impossible, to flag the finality of a decision for EAJA purposes. ALJ decisions frequently are revised *sua sponte*, or

because the claimant's representative has noticed a technical, even typographical, error in them. *See, e.g.*, Secretary's Brief at 5 n.2 & App. 1a-2a, *Sullivan v. Hudson*, 109 S.Ct. 2248 (No. 88-616). The Secretary may argue in such a case that the first decision triggers the 30-day period, and litigation would then ensue as to whether the second, corrected decision is sufficiently "substantive" to establish a new 30-day filing period.

Moreover, in the Secretary's massive, impersonal review system, notices of decision frequently are sent to the claimant only, not to the claimant's representative. *See* Petition for Rehearing *En Banc* by Appellant, Exhibits "A"-"C" (9th Cir. filed July 14, 1989) (affidavits from three attorneys testifying that they frequently do not receive copies of Secretary's administrative decisions). For this reason, among others, the Secretary has established liberal rules for waiving his own intra-agency deadlines, *see, e.g.*, 20 C.F.R. §§ 404.911(a),(b)(7), 404.933(c), 404.982, but he has no such rule for EAJA petitions, and could not, in any event, alter the 30-day EAJA filing deadline established by Congress.

Fourth, the Ninth Circuit's question-begging conclusion that its ruling applies only to fully claimant-favorable decisions (J.A. 32) misses the mark, because, in a system in which further review is possible, it is surely the *claimant*, not the Secretary, who decides whether a decision is fully favorable. *See* Secretary's Brief at App. 1a-2a, *Sullivan v. Hudson*, 109 S.Ct. 2248 (No. 88-616) (claimant's disability onset date was incorrect by full year until error was brought to Secretary's attention); *Bradley*, 741 F.Supp. at 1463. Indeed, the Secretary's own mailing sent to all

claimants whom he believes have received *favorable* decisions states that the claimant may nevertheless (1) file exceptions with the Appeals Council "if you disagree with this decision," or (2) "pursue your civil action with the court." Form HA-L96-U7(5-90) (*infra*, App. 1a-2a).

Fifth, adoption of the Ninth Circuit's approach will invite other government agencies to erect similar barriers to the consideration of EAJA applications based on the purported peculiarities of their own administrative review mechanisms. It will not be long before the INS or the NLRB, for instance, is arguing that some of its administrative decisions on remand, are, under certain conditions known in advance only to the agency, "final judgments" under the EAJA. 28 U.S.C. § 2412(d)(1)(B); *see Lyden*, 731 F.Supp. at 1551-53. Plainly, this is not what Congress had in mind. *See* House Report II at 6 & n.26.

For all of these reasons, the decision of the Ninth Circuit should be reversed.

II. THE NINTH CIRCUIT'S RULING SHOULD NOT BE APPLIED IN THIS CASE.

If this Court upholds the ruling below, it should not be applied retroactively. Under *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), a court may give prospective effect only to decisions that establish new rules of law or overrule clear past precedent, where retroactive application would be inequitable to the party before the court and others similarly situated.

Before turning to the *Chevron Oil* inquiry, however, we must address the threshold consideration of whether

the 30-day filing period is a jurisdictional bar which precludes the Court from engaging in retroactivity analysis. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379-80 (1981) (jurisdictional nature of final order rule of 28 U.S.C. § 1291 prevents retroactivity analysis). The court below, following circuit precedent, stated that the 30-day filing period is "jurisdictional" (JA 29-30) and, thus, not subject to tolling or other equitable doctrines excusing strict compliance under certain circumstances. *But see James v. Dep't of HUD*, 783 F.2d 997, 999 (11th Cir. 1986) ("The thirty-day time limit for filing a fee application should serve as a statute of limitations, not as a trap for the unwary"). It is now clear, however, that the EAJA's filing period is in the nature of a statute of limitations, and not jurisdictional.

In *Irwin v. Veterans Administration*, 111 S.Ct. 453 (1990), the Court held that 42 U.S.C. § 2000e-16(c), which allows an employee aggrieved by a final action of the Equal Employment Opportunity Commission 30 days to file a Title VII action in federal court, is not jurisdictional, but rather is a statute of limitations subject to equitable tolling, as well as other equitable principles. 111 S.Ct. at 456-57 (waiver and estoppel also apply); *see also Bowen v. City of New York*, 457 U.S. 467, 479 (1986). The Court held, as a general matter, that once Congress has waived the government's sovereign immunity, equitable principles apply to the same extent as in a suit among private parties, and that, therefore, statutes of limitations in actions against the government are not jurisdictional. *Id.* at 457. Accordingly, because the EAJA is a waiver of the federal government's immunity to fees and litigation

expenses, its 30-day filing period is not jurisdictional, and ordinary retroactivity principles control.

Turning to the proceedings below and the relevant legal landscape, retroactive application of a rule allowing Appeals Council decisions to trigger the EAJA's limitations period "would be anomalous indeed." *Chevron Oil*, 404 U.S. at 107. When petitioner filed the complaint in June 1984 (JA 5), the law required the Secretary to return to the district court for entry of a final judgment upon which an EAJA award could be made. *Guthrie*, 718 F.2d at 106 (expressly rejecting position that 30-day period may commence with issuance of an administrative decision). Shortly thereafter, the Third Circuit issued its decision in *Brown, supra*, which followed *Guthrie*, 747 F.2d at 884-85, and relied on the Secretary's promise that he would, as a matter of policy, "return to the district court and file a copy of the government's decision upon conclusion of *any* remand proceeding in which a claimant receives benefits." *Id.* at 884 (emphasis in original). *Brown* also noted that the EAJA "requires that a successful claimant apply for a fee award within thirty days of the final judgment of the *district court*." *Id.* (emphasis added).

Thereafter, Congress addressed the issue of finality in the 1985 amendments, making clear that a settlement, like any other indicator of judicial finality, must be made the subject of a court order before the 30-day period begins to run. 28 U.S.C. § 2412(d)(2)(G). The 1985 legislative history adopted *Guthrie*, and stated that the district court's judgment following the "agency decision after remand," and not the agency decision itself, is the "final judgment" for EAJA purposes. House Report I at 20. After the 1985 amendments, as would be expected, the courts continued

to follow *Guthrie* and *Brown*, explicitly or implicitly, with near unanimity. *See, e.g., Seymore v. Sec'y of HHS*, 738 F.Supp. 235, 239 (N.D. Ohio 1990); *Lenz v. Sec'y of HHS*, 641 F.Supp. 144, 145 (D.N.H. 1986); *Fleming v. Bowen*, 637 F.Supp. 726, 729 (D.D.C. 1986); *Miles v. Bowen*, 632 F.Supp. 282, 283 (M.D. Ala. 1986). *But see Wagaman v. Bowen*, 698 F.Supp. 187, 189-90 (D.S.D. 1988).[10]

On May 7, 1985, after a court remand in this case, the Appeals Council issued a decision finding petitioner disabled (JA 14-16). On June 10, 1985, the U.S. Attorney handling petitioner's case received a form from the Secretary stating that, after court remand, "[t]he Appeals Council has issued a decision favorable to the plaintiff. If appropriate, *have the action discontinued or dismissed*" (JA 17-18) (emphasis added). The U.S. Attorney never complied with that directive, and so, on May 18, 1986, petitioner filed an application for attorney's fees. The Secretary opposed this application on the merits, and, on February 18, 1987, the district court entered an order denying the request for fees (JA 22). Neither the Secretary nor the district court raised the issue of timeliness.

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[10] *Wagaman*, the lone decision prior to the Ninth Circuit's ruling that allowed an Appeals Council decision to be a "final judgment" under the EAJA, was issued subsequent to the events giving rise to this dispute, and so has no bearing on the retroactivity issue. *See American Trucking Ass'ns v. Smith*, 110 S.Ct. 2323, 2335 (1990) (plurality opinion). Moreover, *Wagaman* relied on two Eighth Circuit decisions for the proposition that an Appeals Council decision after remand is a final judgment for EAJA purposes, neither of which stand for that proposition. *Wagaman*, 698 F.Supp. at 189 (*citing Gamber v. Bowen*, 823 F.2d 242 (8th Cir. 1987); *Cook v. Heckler*, 751 F.2d 240 (8th Cir. 1984)).

Petitioner appealed, and the parties fully briefed the issues on the merits. The Secretary did not argue on appeal that the Appeals Council's decision could trigger the 30-day limitations period. Despite the Secretary's admitted waiver of this issue (*see* Brief for Appellee at 7 n.3 (9th Cir. filed June 16, 1987)), on July 30, 1987, the Ninth Circuit raised the matter in a *sua sponte* order demanding that petitioner show cause why the case should not be dismissed for lack of jurisdiction (JA 23). Given the fact that the 30-day filing period is not jurisdictional, but is a statute of limitations subject to waiver, the Secretary's failure to raise the issue below is sufficient ground to constitute a waiver in this case.

At no point did the legal terrain portend the decision below. Indeed, in 1989, the requirement that the Secretary obtain a final judgment after remand, at least for EAJA purposes, gained explicit approval from this Court. *Hudson*, 109 S.Ct. at 2254-55 (approving *Taylor*, *Brown*, and *Guthrie*). The Secretary's position also remained constant, recognizing that the law required him, "at least for purposes of awarding attorney's fees" under the EAJA, to return to the district court, and that only a court judgment can trigger the 30-day filing period. Secretary's Reply Brief at 12, *Sullivan v Hudson*, 109 S.Ct. 2248 (No. 88-616). Even in *Finkelstein* – the ruling now claimed to require affirmance here – the Secretary remained true to his prior position:

> Of course, it is appropriate for the Secretary to file *any* new decision awarding benefits with the court so that the court can consider whether attorney's fees should be awarded under the EAJA.

Secretary's Brief at 44 n.35, *Sullivan v. Finkelstein*, 110 S.Ct. 2658 (No. 89-504) (emphasis added).

Moreover, elsewhere the Secretary has taken the position that a Social Security claimant has the absolute right to return to the district court on the merits – whether or not the Secretary believes that the claimant has won on remand – and, therefore, presumably, for attorney's fees as well. 54 Fed. Reg. 37,789, 37,791 (1989) (in promulgating regulations concerning intra-agency review of ALJ decisions on remand, Secretary states that failure to file exceptions to ALJ's decision on remand does not bar return to court; claimant need not file new civil action after issuance of unfavorable ALJ decision). Furthermore, on the forms *currently* used by the Secretary to inform claimants of both favorable and unfavorable ALJ decisions on remand, claimants are informed that they have the absolute right to return to the district court and that "we will forward a copy of the decision, and a transcript of the record in your case to the United States Attorney for filing with the court" (*infra*, App. 1a-4a). *Accord* Administrative Office of the U.S. Courts, *1989 Annual Report of the Director – Report of Fees and Expenses Awarded Under The Equal Access to Justice Act* 98 (report required by 28 U.S.C. § 2412(d)(5)).

With this background in mind, we turn to the first of three factors under *Chevron Oil* – whether the decision below established a new principle of law, either because it overruled clear past precedent or because it decided an issue of first impression the resolution of which was not clearly foreshadowed. 404 U.S. at 107. In applying this factor, we look to the law at the time that the underlying conduct, or the failure to act, took place. *Id.* at 106-09

(refusing to apply retroactively decision altering applicable statute of limitations, and looking to law in effect when new limitations period would have expired); *see also American Trucking Ass'ns v. Smith*, 110 S.Ct. 2323, 2336 (1990) (plurality opinion); *id.* at 2353-55 (dissenting opinion of Stevens, J.) (recognizing continued vitality of *Chevron Oil* in statute of limitations context).

There can be no question that, at the time the relevant event took place – when petitioner failed to divine the need to file his fee petition within 30 days of the administrative decision on remand in June 1985 – the law unequivocally required the Secretary to return to the district court after remand to report the results of the proceeding, and thereby either continue or dismiss the pending civil action. Under the EAJA, it was equally clear that a final judgment from the district court after remand was necessary to trigger the 30-day limitations period, as the Secretary expressly told this Court just last Term in *Finkelstein*, and as the Court itself had indicated in *Hudson*. 109 S.Ct. at 2254-55; *see also Myers*, 916 F.2d at 679 n.20 (noting that decision below "would seem to be contrary to *Sullivan v. Hudson*"). Thus, the Ninth Circuit's decision established a new principle of law, "by overruling clear past precedent on which litigants may have relied." *Chevron Oil*, 404 U.S. at 106.

Next, given the prior history of the 30-day rule and its purpose and effect, retroactive application of a new rule would plainly retard the purposes of the law. *Id.* at 106-07. Indeed, retroactive application of the Ninth Circuit's decision would be inconsistent with the basic purposes of the EAJA which are to increase court access for

individuals and to improve government policies. *Commissioner v. Jean*, 110 S.Ct. at 2322 n.14. Moreover, retroactive application would be the very "trap for the unwary resulting in the unwarranted denial of fees" that Congress sought to eliminate in the 1985 amendments. House Report II at 6 n.26.[11]

Finally, retroactive application would produce substantially inequitable results, *Chevron Oil*, 404 U.S. at 107, as the facts of this case illustrate. Petitioner's counsel, a solo practitioner, took this case on a contingent basis, recognizing that the EAJA would be the only basis for a full fee under the SSI program. *See* 42 U.S.C. § 406(b) (withholding past-due benefits allowed in Title II cases only); *Bowen v. Galbreath*, 485 U.S. 74, 77 (1988) (district court has no authority to withhold attorney's fees from retroactive SSI awards, noting "extreme financial need of SSI beneficiaries"). After toiling for several years on his client's behalf, and after the Secretary failed to file the administrative decision with the court, counsel moved for EAJA fees at a point considered timely under a nationwide practice so settled that neither the Secretary nor the court raised the issue in the district court. To deny petitioner now an opportunity for a fee "would surely be

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[11] Of the 412 EAJA applications filed in fiscal year 1990, only four were denied on timeliness grounds. Administrative Office of the U.S. Courts, *1990 Annual Report of the Director – Report of Fees and Expenses Awarded Under the Equal Access to Justice Act* I-24, Table 20, I-27. The decision below, however, has interjected a great deal of confusion, which, in itself, has resulted in more than four *reported* decisions on the issue of timeliness under 28 U.S.C. § 2412(d)(1)(B). *See Myers*, 916 F.2d at 661 n.2 & 678 n.19.

inimical to the beneficent purpose of the Congress." *Chevron Oil*, 404 U.S. at 108.

Moreover, retroactive application also would be unjust to the numerous other claimants and their representatives who would otherwise suffer from an affirmance here. Attorneys with pending EAJA petitions, or for whom 30 days has run from a claimant-favorable administrative decision on remand, relied on settled law and should not be penalized now by the Secretary's abrupt turnabout occasioned solely by the Ninth Circuit's *sua sponte* order. More fundamentally, Title II claimants will be damaged severely because, although their attorneys will still get a fee from *their* past-due benefits under 42 U.S.C. § 406(b), an affirmance here will, if applied retroactively, negate any possibility of an EAJA fee, thus creating the potential that claimants will suffer substantial losses of needed disability benefits. *See Watson*, 735 F.Supp. 971 (potential loss of more than $7,000 in past-due benefits by retroactive application of *Melkonyan*); *Beckstead v. Sullivan*, No. 89-15715 (9th Cir. November 2, 1990) (unpublished), 1990 U.S.App. LEXIS 21246 (retroactivity of *Melkonyan* raised, but case decided on other grounds). *But cf. Myers*, 916 F.2d at 677-78 (holding that *Finkelstein* should not apply retroactively to EAJA timeliness questions).

Thus, if the Ninth Circuit's ruling is upheld, this Court should give that ruling prospective effect only because, as in *Chevron Oil*, the "equities require[] non-retroactive application of the . . . statute of limitations here." 404 U.S. at 109. In addition to those equities, the EAJA's plain language, history and purposes demand

that the 30-day limitations period commence in the courthouse, not at the agency.

CONCLUSION

For the reasons stated above, the decision of the Ninth Circuit should be reversed.

Respectfully submitted,

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APPENDIX

NOTICE OF FAVORABLE DECISION-TITLE II, TITLE XVI AND TITLE XVIII
(Use in Court-Remanded Cases Only)

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
SOCIAL ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

NOTE TO PROCESSING CENTER:

FURTHER ACTION NECESSARY

Name and Address of Claimant:

•

SSN:

Date mailed:

Name and Address of Representative:

•

NOTICE OF ADMINISTRATIVE LAW JUDGE DECISION — PLEASE READ CAREFULLY

Enclosed is the Administrative Law Judge's decision on your claim. This notice gives you information about what you can do if you disagree with the decision. Please read this notice and the decision carefully.

This Decision Is Favorable To You

- Another office of the Social Security Administration will process the decision and will send you a notice about your benefits. Your local Social Security office or another Social Security office may ask you for more information before you receive the notice about your benefits. If this happens, please answer promptly.
- You should hear something about this decision within 60 days. If you do not, contact your local Social Security office.

If You Disagree With This Decision

If you disagree with the Administrative Law Judge's decision, you may appeal to the Appeals Council. You must do this by filing written exceptions. Exceptions are your statements explaining why you disagree with the decision of the Administrative Law Judge.

- Mail the written statement of your exceptions to the Appeals Council, Office of Hearings and Appeals, P.O. Box 3200, Arlington, VA 22203.
- You must file your written exceptions **within 30 days** from the date you receive this notice. The Appeals Council assumes that you receive this notice within five days after the date at the top of this notice unless you show that you did not receive it within the five-day period.

CLAIMS FOLDER

Form HA-L98-U7 (5-90) *Destroy Prior Editions*

- If you need more time to file your written exceptions, you must file a written request for additional time with the Appeals Council within 30 days of the date you receive this notice. If you request more than a 30-day extension of time, you must explain why you need the extra time.

- Please **include the Social Security number(s)** shown on the decision on any paper you send to the Appeals Council.

- The Appeals Council will consider your exceptions and the parts of the decision you think are wrong. The Appeals Council may also consider those parts which you think are correct.

- If the Appeals Council concludes that further action is necessary, it will either return your case to an Administrative Law Judge for further action or issue a decision.

- If the Appeals Council issues a decision, its decision may be either more or less favorable to you than the decision of the Administrative Law Judge.

- If the Appeals Council concludes that the decision of the Administrative Law Judge is correct, it will notify you in writing why your exceptions do not warrant a change in the decision of the Administrative Law Judge.

- If you submit written exceptions and the Appeals Council does not change the decision of the Administrative Law Judge, that decision becomes the final decision of the Secretary after remand.

- Any future claim you may file will not change a final decision on this claim if the facts and issues are the same.

You Do Not File Written Exceptions

Even if you do not file exceptions, the Appeals Council may review your case on its own motion (within 60 days from the date this notice was mailed). The Appeals Council will notify you if it decides to do so and will advise you what action it proposes to take.

If the Appeals Council does not review your case on its own motion and you do not file exceptions, we will forward a copy of the decision, and a transcript of the record in your case to the United States Attorney for filing with the court. You have the right to pursue your civil action with the court.

New Application

You have the right to file a new application at any time, but filing a new application is not the same as filing exceptions to this decision. You might lose benefits if you file a new application instead of filing written exceptions to this decision. Therefore, if you think this decision is wrong, you should file your exceptions within 30 days.

If you have any questions, please contact your local Social Security office. If you visit, please bring this notice and decision with you.

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NOTICE OF UNFAVORABLE DECISION - TITLE II, TITLE XVI AND TITLE XVIII
(Use in Court-Remanded Cases Only)

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

Name and Address of Claimant:

•

SSN:

Date mailed:

Name and Address of Representative:

•

NOTICE OF ADMINISTRATIVE LAW JUDGE DECISION—PLEASE READ CAREFULLY

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- If the Appeals Council concludes that the decision of the Administrative Law Judge is correct, it will notify you in writing why your exceptions do not warrant a change in the decision of the Administrative Law Judge.

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If the Appeals Council does not review your case on its own motion and you do not submit exceptions, we will forward a copy of the decision and transcript of the record in your case to the United States Attorney, for filing with the court. You have the right to pursue your civil action with the court.

New Application

You have the right to file a new application at any time, but filing a new application is not the same as filing exceptions to this decision. You might lose benefits if you file a new application instead of filing written exceptions to this decision. Therefore, if you think this decision is wrong, you should file your exceptions within 30 days.

If you have any questions, please contact your local Social Security office. If you visit, please bring this notice and decision with you.